Local 7, Sheet Metal Workers' International Association, AFL–CIO *and* Andy J. Egan Co., Inc. Case 7–CC–1767

December 6, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 10, 2003, Administrative Law Judge Ira Sandron issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

This case involves allegations of secondary picketing and threats of same at a large construction site occupied by multiple employers. The complaint alleges that the Respondent Union violated Section 8(b)(4)(ii)(B) by threatening to picket Andy J. Egan Co., a neutral employer, in order to force Egan to stop doing business with Target Construction, Inc., with whom the Union had a labor dispute. The complaint further alleges that the Union violated Section 8(b)(4)(ii)(B) by picketing at the jobsite at a gate reserved for neutral employers and by picketing on a pedestrian bridge and adjacent sidewalk near the jobsite. The judge dismissed all of the allegations.

We agree with the judge, for the reasons stated in his decision, that the Union did not threaten to picket Egan for a secondary object. We also agree with the judge, for the reasons stated in his decision, that the picketing on the pedestrian bridge and sidewalk did not violate Section 8(b)(4)(ii)(B).[2] Accordingly, we adopt the judge's dismissal of those allegations. Contrary to the judge, however, we find that the Union violated Section 8(b)(4)(ii)(B) by picketing at gate 5, a gate reserved for neutral employers.

I. BACKGROUND

The picketing at issue here took place at the jobsite for the Grand Rapids Convention Center, a large construction project. Hunt Construction is the general contractor. There are more than 90 subcontractors. One subcontractor (Egan) further subcontracted to Target.

Egan is a mechanical contractor whose employees are represented by a union. Target is a nonunion sheet metal contractor. Egan began performing work on the convention center job in February 2001, using Target as its sheet metal subcontractor. Sometime in late 2002, the Union made plans to picket at the convention center jobsite beginning in January 2003. The Union's representatives testified that the picketing was to be directed at Target, because Target did not pay union scale wages and benefits.

Around January 2, 2003,[3] Hunt Construction Manager William Sewall heard a rumor that the Union was planning to picket Egan and Target at the convention center jobsite. On the morning of Friday, January 3, Sewall called Union Business Representative Doug Adams and told Adams that Sewall would establish a reserved gate system at the jobsite. Sewall testified that he told Adams that Sewall had heard that the Union had a dispute with Egan. Adams replied that the Union's dispute was with Target, not Egan.

Also on the morning of January 3, Sewall faxed a letter to Hunt's subcontractors outlining the reserved gate system, which was to take effect on Monday, January 6. The letter established seven gates numbered 2 through 8.[4] The letter stated that gate 7 was reserved for "employees, suppliers, vendors and visitors of Andy J. Egan Company and Target Construction, Inc.," and that the other gates "have been established as neutral gates" for all other contractors. About noon on January 3, Sewall faxed Adams and Union Business Manager Butch Fuller a similar letter, stating in relevant part:

> Effective January 6, 2003, a reserved gate will be in effect for Andy J. Egan Company and Target Construction, Inc., their employees, suppliers, vendors and visitors. This entrance is located at the North West corner

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting these dismissals, Chairman Battista notes the General Counsel's contention that an object of the threat and this picketing was to place pressure on Egan to cease doing business with Target because of Target's labor standards. The Respondent had been investigating Target's labor standards for 2 years. It was only after Egan chose Target as a subcontractor that the Respondent engaged in the conduct herein. However, this timing does not itself establish a violation. A union can engage in conduct against a primary subcontractor irrespective of when that subcontractor has been chosen, and who chose it. And, except for the unlawful picketing at neutral gate 5, discussed infra, there is no showing of an intent to enmesh Egan.

[3] All dates are in 2003 unless otherwise specified.

[4] There was no gate 1.

> of the jobsite closest to the Michigan Street Bridge and is designated Gate #7. . . . You are to confine your activities to this location.

Adams testified that he read the letter at about 4:30 on January 3 and that he was surprised and confused to see that gate 7 would be reserved for Egan as well as Target. However, Adams did not call Sewall to ask for an explanation.

On January 3 and 4, Sewall posted the reserved gate signs on the jobsite. Consistent with Sewall's January 3 fax, the sign posted at gate 7 stated:

> THIS GATE IS RESERVED FOR THE EXCLUSIVE USE OF EGAN & TARGET CONSTRUCTION COMPANIES. ITS EMPLOYEES & SUPPLIERS AND OTHER BUSINESS INVITEES OF EGAN & TARGET CONSTRUCTION COMPANIES. SUCH PERSONS MAY NOT USE ANY OTHER ENTRANCE TO THIS PROJECT. NO OTHER PERSONS ARE PERMITTED TO USE THIS GATE, ALL OTHER COMPANIES, THEIR EMPLOYEES, SUPPLIERS AND BUSINESS INVITEES ARE TO USE GATES 2 3 4 5 6 8.

The sign posted at gate 5 listed the names of 41 contractors and stated that the gate was "reserved for the exclusive use of" those contractors and that "[n]o other persons are permitted to use this gate." Neither Target's name nor Egan's name was listed.

About 10 a.m. on January 6, Adams and about 12 pickets arrived at gate 7 to begin picketing.[5] Adams saw that the reserved gate sign at gate 7 listed the names of both Egan and Target. Adams testified that he was confused by the sign, because he had told Sewall on Friday that the Union's dispute was with Target, not Egan. Again, however, Adams did not seek clarification from Sewall.

About 10:25, Adams asked the pickets at gate 7 if any of them wanted to go to gate 5. Adams claimed that he did so because he felt the gate 7 sign was incorrect. Three of the 12 pickets walked over to gate 5. About 10:30, Adams joined them. Although not explicitly stated in the record, it appears that the other nine pickets stayed at gate 7.

Adams testified that about 10 minutes after he arrived at gate 5, Sewall approached him and told him that the picketing at gate 5 was in violation of the reserved gate system. Sewall told Adams that Sewall would call the authorities if the pickets did not leave that gate. However, Adams and the pickets refused to leave. Adams testified that he told Sewall the sign was incorrectly posted and that the pickets had a right to be at gate 5.

Sometime before noon, Sewall decided to remove Egan's name from the gate 7 sign. He drafted a letter modifying the reserved gate system to provide that gate 7 would be reserved for Target only, effective at noon. Sewall faxed a copy of the letter to Fuller and hand-delivered a copy to Adams. Sewall then used duct tape to cover Egan's name on the gate 7 sign.

After Sewall decided to modify the gate 7 sign, Adams and the other three pickets left gate 5 and returned to gate 7. The judge found, and the Union admits, that the Union picketed at gate 5 for a total of 40 to 55 minutes. It is undisputed that the pickets remained at gate 5 for some period of time even after Sewall told them that their activity at gate 5 violated the reserved gate system.[6]

II. LEGAL FRAMEWORK

The Act draws a distinction between picketing directed at a primary employer—an employer with whom the union has a labor dispute—and picketing directed at neutral or secondary employers who have no dispute with the union in order to force those employers to stop doing business with the primary employer. Section 8(b)(4)(ii)(B) "makes it unlawful for a labor organization or its agents to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring any person to cease doing business with any other person." *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1191 fn. 6 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003) (quoting *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 fn. 11 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992)). In order for the picketing to be unlawful, the secondary object need only be "an object"—not the sole object—of the picketing. *Denver Building Trades Council v. NLRB*, 341 U.S. 675, 689 (1951).

The picketing in the present case took place at the convention center jobsite, which is jointly occupied by the primary employer, Target, and by neutral employers, including Egan. When analyzing union picketing at a "common situs," the Board must give effect to the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *Denver Building*, supra at 692.

[5] Their picket signs stated that "Target Construction Inc. pays substandard wages and benefits."

[6] Adams testified that Sewall delivered the letter modifying the reserved gate system about 10 minutes after Sewall first told the pickets to leave gate 5, and that the pickets left gate 5 after receiving the letter. However, Adams admitted that he "wasn't watching his watch." Adams also testified that the total time the pickets remained at gate 5 was about 55 minutes, which would mean that the pickets did not leave gate 5 until around 11:20, 40 minutes after Sewall first asked them to leave.

To accommodate these often conflicting objectives, the Board established the following guidelines to help determine whether picketing at the common situs is lawful primary picketing or picketing with a proscribed secondary object:

> [P]icketing . . . is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Sailors' Union of the Pacific (Moore Dry Dock), 92 NLRB 547, 549 (1950). Although failure to comply with one or more of the *Moore Dry Dock* standards does not constitute a per se violation of the Act, it creates a strong but rebuttable presumption that the picketing had an unlawful secondary object. See *Electrical Workers Local 332 (W.S.B. Electric)*, 269 NLRB 417, 421 (1984); accord: *Electrical Workers Local 970 (Interox America)*, 306 NLRB 54, 58 (1992). The present case involves only the third *Moore Dry Dock* standard: whether the picketing was limited to places reasonably close to the location of the situs of the dispute between the Union and Target.[7]

The Supreme Court has approved the use of the reserved gate system as a means to isolate the situs of a dispute on a common worksite. See *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667 (1961). Under a reserved gate system, one entrance or gate is reserved for the exclusive use of the primary employer and its employees, suppliers, and customers, and the other gates are reserved for the exclusive use of neutral employers and their employees, suppliers, and customers. The purpose of the separate gate "is to permit lawful picketing that will be conducted so 'as to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees.'" *NABET, Local 31 (CBS, Inc.)*, 237 NLRB 1370, 1375 (1978), enfd. 631 F.2d 944 (D.C. Cir. 1980) (overruled in part on other grounds *United Scenic Artists Local 829 (Theatre Techniques, Inc.)*, 267 NLRB 858 (1983) (quoting *Electrical Workers Local 640 (Timber Buildings, Inc.)*, 176 NLRB 150 (1969)). Use of a neutral gate by employees, suppliers, or other invitees of the primary employer may compromise the integrity of the gate, "which would result in destroying its immunity from primary picketing." *CBS*, supra at 1375. "If the integrity of a reserved gate system has been maintained, and the primary employer or their employees or suppliers have not used or attempted to use one of the neutral gates, then picketing of the primary employer must be confined to the area reasonably close to the reserved primary gate, and cannot be conducted at the neutral gates." *Interox America*, supra at 58. When a valid reserve gate system is in effect, picketing at a neutral gate violates *Moore Dry Dock* and therefore gives rise to a presumption that the union is pursuing an unlawful secondary objective. See *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593, 600 (1999); *Operating Engineers Local 150 (Harsco Corp.)*, 313 NLRB 659, 668 (1994), enfd. 47 F.3d 218 (7th Cir. 1995)**;** *W.S.B. Electric*, supra at 421; accord: *Interox America*, supra at 59.

[7] The parties do not dispute that the Union complied with the other three *Moore Dry Dock* standards.

III. JUDGE'S DECISION AND EXCEPTIONS

The judge found that the picketing at gate 5 complied with *Moore Dry Dock*. The judge noted that the picketing occurred only at a time when Egan's name was listed along with Target's name on the reserved gate sign at gate 7. The judge found that Adams had "good cause to be confused" by the sign, because Adams had told Sewall on January 3 that the Union had no dispute with Egan. The judge also stated that the gate 5 picketing did not show "secondary intent aimed at Egan," because Egan's name was not listed on gate 5 as a neutral that could use that gate.

The judge reasoned that even if the picketing at gate 5 was a "technical" violation of *Moore Dry Dock*, the violation was "inadvertent and of short duration" and therefore "did not rise to the level of noncompliance." Therefore, he found that the Union was entitled to a presumption that the picketing was lawful. The judge concluded that the "totality of the circumstances does not reveal evidence of secondary motive that would rebut" the presumption that the picketing was lawful. Accordingly, the judge recommended dismissing this allegation of the complaint.

The General Counsel excepts to this dismissal. The General Counsel argues that Adams had no cause to be confused over which gate Target employees were using, because Sewall's January 3 fax and the gate 7 sign clearly restricted Target to gate 7. The General Counsel also notes that the January 3 fax specifically stated that gate 7 was reserved for both Egan and Target. Therefore, the Union had no reason to be confused on January 6 when the pickets arrived at the jobsite and saw that the actual sign on gate 7 listed both Egan and Target. Finally, the General Counsel argues that the judge erred in relying on the fact that Egan's name was not listed on

gate 5, because the Board's decisions governing common situs picketing are designed to prevent enmeshing *any* neutrals in the dispute between a union and a primary employer.

IV. DISCUSSION

We find merit in the General Counsel's exception. For the reasons stated below, we disagree with the judge's reliance on Adams' "confusion." We further disagree with the judge's finding that any violation of *Moore Dry Dock* was "inadvertent and of short duration" and "did not rise to the level of noncompliance." The Union picketed for 40 to 55 minutes at gate 5, a reserved neutral gate, even though the Union had no reason to believe that Target or its employees, suppliers, or other invitees had used gate 5. We find that the picketing at gate 5 violated *Moore Dry Dock* and gave rise to a presumption that the picketing had an unlawful secondary object.

First, neither Sewall's communications with the Union on January 3 nor the reserved gate signs posted on January 6 would have led the Union to believe that Target's employees, suppliers, or customers were using gate 5. Sewall's January 3 fax to Adams made clear that Target would be restricted to gate 7. The reserved gate sign posted at gate 7 stated that Target "may not use any other entrance to this project." The sign at gate 5 also made clear that Target was not permitted to use that gate. The sign stated that the gate was "reserved for the exclusive use" of the 41 contractors listed on the sign, and that no one else was permitted to use the gate. Target was not one of the listed contractors.[8] Furthermore, there is no evidence that Target's employees, suppliers, customers, or other invitees ever violated the reserved gate system by using gate 5 (or any gate other than gate 7). Thus, the Union picketed at gate 5 without any reason to believe that Target was using that gate, demonstrating that the object of the picketing was not limited to the legitimate primary objective of pressuring Target to pay union scale wages and benefits.

Second, the Union's claim that it was confused by the gate 7 sign is undermined by Adams' failure to make any effort to resolve the alleged confusion before sending pickets to gate 5. On January 3, 3 days before the picketing, Sewall notified Adams by fax that gate 7 would be reserved for both Egan and Target. On January 6, when the Union arrived at gate 7 to begin picketing, the gate 7 sign listed Egan's name as well as Target's. Adams testified that he was confused on January 3 when he received Sewall's fax and again on January 6 when he saw Egan's name on the gate 7 sign. However, Adams failed to seek any clarification from Sewall or any other representative of Hunt on either occasion.

Third, the pickets refused to leave gate 5 even after clear notice from Sewall that it was a neutral gate. Within about 10 minutes after Adams and the pickets arrived at gate 5, Sewall approached Adams and informed him that the picketing at gate 5 violated the reserved gate system. Sewall stated that he would call the authorities if the Union did not leave. Nevertheless, the pickets waited anywhere from 10 to 40 minutes after Sewall's warning before leaving gate 5 and returning to gate 7.[9]

Fourth, we disagree with the judge's reliance on the alleged "short duration" of the picketing to support his conclusion that the picketing was at most a "technical violation" of *Moore Dry Dock* that "did not rise to the level of noncompliance."[10] In assessing the lawfulness of the picketing, the Board must examine the circumstances of each case.[11] There is no support for the

[8] The judge found that the gate 5 picketing did not show an intent to enmesh Egan in the primary dispute, because Egan's name also was not listed on the gate 5 sign as a contractor permitted to use that gate. The point, however, is that gate 5 was reserved for neutral employers and was not to be used by Target. The Board's standards governing common situs picketing are designed to prevent enmeshing *any* neutrals on a common situs project. See *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market)*, 116 NLRB 856, 858 (1956), enfd. 249 F.2d 591 (9th Cir. 1957) (noting that one of the "congressional objectives" of Sec. 8(b)(4) is to "shield[] unoffending employers and others from pressures in controversies not their own.").

[9] To the extent the Union suggests that the reserved gate system was improperly established because Egan's name was included on the gate 7 sign, and that the Union was therefore entitled to picket at the neutral gates, we reject that argument. The gate 7 sign clearly stated that Target was to use that gate and no other. The gate 5 sign prohibited anyone but the named contractors (which did not include Target) from using that gate.

Nor can the Union argue that it picketed at gate 5 out of concern that picketing at gate 7 would be improper as long as Egan's name was on the sign. Again, the gate 7 sign clearly stated that Target was to use only that gate. Moreover, Adams sent only 3 pickets to gate 5. The rest of the 12 pickets apparently remained at gate 7. The fact that Egan's employees, in addition to Target's employees, used gate 7 during the time when Egan's name was listed on the sign did not entitle the Union to picket at other gates. Although use of a neutral gate by the primary employer may compromise the gate and destroy its immunity from picketing, the converse is not the case. Employees, suppliers, and other invitees of a neutral employer may use the gate reserved for the primary employer without compromising the reserved gate system. See *Service Employees Local 32B-32J (New York Assn. for the Blind)*, 250 NLRB 240, 245, 247 (1980). In sum, the Union could lawfully picket gate 7 because that was a gate used by Target. The fact that Egan was using that gate simply meant that Egan would be subject to that picketing. That fact did not privilege picketing at gate 5.

[10] In response to his concurring colleague, Member Schaumber points out that alleged misconduct that is "of such limited impact and significance" may not rise "to the level of constituting a violation of our Act," *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973), but he finds this is not such a situation.

[11] Cf. *Interox America*, supra at 58 ("The territorial limits of permissible picketing at or reasonably close to a reserved primary gate must

judge's conclusion, however, that this picketing of 40 to 55 minutes constituted picketing of a short duration. Indeed, the Board has found a violation of Section 8(b)(4)(ii)(B) where the duration of the activity was comparable to the duration in the present case. See *CBS*, supra at 1374, 1376 (finding violation of Sec. 8(b)(4)(ii)(B) based on activity that lasted 45 to 60 minutes). The decision relied on by the judge, *Electrical Workers Local 3 (Surf Hunter Electric Co.)*, 172 NLRB 1101 (1968), is distinguishable.

In *Surf Hunter*, the issue was whether the respondent union violated the Act by picketing for a short time with signs that improperly identified the primary employer. The picket signs listed an employer that was a member of the same multiemployer association as the primary employer, but had no connection with the job being picketed. Thus, *Surf Hunter* involved an entirely different criterion of *Moore Dry Dock*: the requirement that the picketing clearly disclose that the dispute is with the primary employer. The issue in the present case, of course, is whether the Union's picketing at a reserved neutral gate violated the *Moore Dry Dock* requirement that picketing be confined to a location reasonably close to the situs of the primary dispute. Furthermore, the Board in *Surf Hunter* relied on the fact that the union changed its signs to reflect the true primary employer "immediately after the error was discovered." Under those circumstances, the Board found the incident "insufficient to require an unfair labor practice finding." 172 NLRB at 1102. In the present case, as stated above, the Union remained at gate 5 even after being told by Sewall that gate 5 was a neutral gate. We do not find the gate 5 incident insufficient to warrant an unfair labor practice finding.

Under all the circumstances—the absence of any basis for the Union to believe that Target was using gate 5, the lack of any effort by Adams to resolve his alleged confusion, and the Union's insistence on remaining at gate 5 even after Sewall clearly informed the pickets that their activity at gate 5 violated the reserved gate system—we cannot agree with the judge's characterization of the gate 5 picketing as a mere "technical violation" of *Moore Dry Dock* that "was inadvertent and of short duration and did not rise to the level of noncompliance." The Union picketed a designated neutral gate, which the Union had no reason to believe had been used by the primary employer. The picketing at gate 5 failed to comply with the *Moore Dry Dock* standard that common situs picketing be "limited to places reasonably close to the location of the situs" of the primary dispute. We therefore presume that the picketing at gate 5 had an unlawful secondary object.

The Union failed to rebut that presumption. The only justification offered by the Union for the gate 5 picketing was the inclusion of both Egan's and Target's names on the gate 7 sign. For the reasons discussed above, we find that alleged justification insufficient to rebut the presumption that the picketing had an unlawful secondary object. Accordingly, the Union violated Section 8(b)(4)(ii)(B) by picketing at gate 5.

ultimately be decided on a case-by-case basis, taking into account all the relevant circumstances.").

REMEDY

Having found that the Union has engaged in an unfair labor practice in violation of Section 8(b)(4)(ii)(B) of the Act, we shall order the Union to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Local 7, Sheet Metal Workers' International Association, AFL–CIO, Lansing, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from threatening, coercing, or restraining Andy J. Egan Co. by picketing, where an object thereof is to force or require Andy J. Egan Co. to cease doing business with Target Construction, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by Andy J. Egan Co. and Target Construction, Inc., if willing, at all places where their notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 6, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring in part.

The Respondent picketed at gate 5, a designated neutral gate, despite the absence of any evidence that gate 5 had been used by employees or suppliers of the primary employer. For two reasons, I concur in the majority's conclusion that the gate 5 picketing violated Section 8(b)(4)(ii)(B).[1]

First, I am generally reluctant to dismiss allegations as merely "de minimis" violations of the Act.[2] In dismissing the complaint allegation about the gate 5 picketing, the judge emphasized its short duration (about 50 minutes). He characterized the picketing as, at most, a "technical violation" of *Moore Dry Dock*[3] that "did not rise to the level of noncompliance." As a general matter, if a respondent's conduct violates the Act, the Board should find and remedy that violation. See Section 10(c).

Second, under long-established precedent, the neutral gate 5 picketing did violate the *Moore Dry Dock* standards. The Respondent, having picketed at a designated neutral gate, has the burden to justify its disregard of the reserved gate system.[4] The question presented is whether, as the Respondent contends, confusion was created because the sign at gate 7, the primary gate, stated that it was reserved for employees of both Target (the primary) and Egan (a neutral), and whether that confusion justified the gate 5 picketing. But it is well established that:

> [t]he reserved gate system is a "one-way street." The separate gate system is "tainted" *only* where employees or suppliers of the primary employer use the reserved, 'neutral' gate; however, if neutral employees use the primary's gate, voluntarily subjecting themselves to the coercive power of the union's picketing, no "taint" occurs.

NLRB v. Elevator Constructors, 902 F.2d 1297, 1301 (8th Cir. 1990) (quoting *Mautz & Oren, Inc. v. Teamsters Local 279*, 882 F.2d 1117, 1123 fn. 4 (7th Cir. 1989) (emphasis in original)). Therefore, the Egan employees' use of gate 7 did not "taint" the reserved gate system or thereby privilege the Respondent to picket at gate 5, or at any other designated neutral gate.[5]

Dated, Washington, D.C. December 6, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT threaten, coerce, or restrain Andy J. Egan Co. by picketing, where an object thereof is to force or require Andy J. Egan Co. to cease doing business with Target Construction, Inc.

LOCAL 7, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL–CIO

[1] I join the majority decision in all other respects.

[2] See, e.g., *Dish Network Service Corp.*, 339 NLRB 1126, 1127–1128 (2003); *Golub Corp.*, 338 NLRB 515, 516–517 (2002).

[3] *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950).

[4] *Operating Engineers Local 12 (McDevitt & Street Co.)*, 286 NLRB 1203, 1203–1204 (1987).

[5] The gate system was not ambiguous. Target's name was listed clearly on gate 7 and was not listed on gate 5. The presence of Egan's name as well as Target's on the gate 7 sign would not lead Target employees or suppliers to believe they could use gate 5 instead of gate 7. See, e.g., *Interox America*, 306 NLRB 54, 60 (1992).

Jamie VanderKolk, Esq., for the General Counsel.
Tinamarie Pappas, Esq., of Ann Arbor, Michigan, for the Respondent.
Timothy J. Ryan, Esq. (Miller, Johnson, Snell, & Cummiskey), of Grand Rapids, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a complaint and notice of hearing (complaint) issued on February 10, 2003,[1] against Local 7, Sheet Metal Workers' International Association, AFL–CIO (the Union). The complaint alleges that the Union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act) by engaging in conduct that had an object of forcing or requiring Andy J. Egan Company, Inc. (Egan) to cease doing business with Target Construction Inc. (Target), a nonunion company with which the Union has a labor dispute. The sole jobsite directly relevant to this proceeding is the DeVos Place Convention Center project, Grand Rapids, Michigan (the project), at which Hunt Construction Group, Inc. (Hunt) is the general contractor.

Pursuant to notice, I conducted a trial in Grand Rapids, Michigan, on May 19 and 20, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

The General Counsel's witnesses were Casey Schellenboom, Egan's vice president and treasurer; David Hartwell and Bernard Holtrop, job foremen for Target; and William Sewall, Hunt's construction manager at the project. Schellenboom and Holtrop were also called by Egan, as was Neal Biggs, a project safety manager for Hunt.

The Union called Richard Fuller, union business manager; Doug Adams, union business representative; Tim Caron, a union organizer; pickets Thomas Cox and Jack Gould; and Bob Seifert, a supervisor for Elite Security Services.

All parties filed helpful posthearing briefs, which I have duly considered.

Issues

Whether the Union, in furtherance of its labor dispute with Target, and with an object of forcing or requiring Egan to cease doing business with Target, engaged in the following conduct:

1. As alleged in paragraph 11 of the complaint, threatened Egan on or about November 22 and December 2, 2002, that it would picket all of its jobsites unless Egan ceased doing business with Target. This relates to two telephone conversations between Fuller and Schellenboom.

2. As alleged in paragraph 13, violated the reserve gate system Hunt established at the project, by maintaining pickets at gate 5, on about January 6; and at the driveway approach to gate 8, from January 6–10.

3. As alleged in paragraph 14, maintained pickets at a pedestrian bridge utilized by employees of contractors and persons other than Target.

The Union denies that Fuller threatened Schellenboom and that its picketing had a secondary object. Rather, the Union argues that it was engaged in a lawful primary picket of Target.[2]

On the entire record, including my observations of the witnesses and their demeanor, I make the following

Findings of Fact

Egan, a Michigan corporation with an office and place of business located in Walker, Michigan, is engaged in the construction industry in the design and construction of commercial heating, cooling, plumbing, and refrigeration systems. It has a contract with the Union. Target, a Michigan corporation with an office and place of business in Rockford, Michigan, is a nonunion sheet metal contractor in the construction industry. Egan and Target are employers engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) and Section 8(b)(4) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

The $200 million convention center project covers approximately seven acres in downtown Grand Rapids. At the project, Hunt employs over 90 subcontractors and sub-subcontractors, including Egan, which began performing work there in February 2001, and has always used Target as its sheet metal subcontractor. At the time of the Union's alleged unfair labor practices, Egan was working on about six large projects, four of which were using unionized sheet metal subcontractors.

1. Prepicketing events

Both Caron and Adams testified about how the Union reached the conclusion that Target did not pay union scale wages and benefits. In Caron's role as an organizer, he visits nonunion jobsites, including Target's, and talks with employees. He has been to numerous Target sites, where he has asked its employees if they are journeymen or apprentices and has discussed wages with them. No Target employee has ever disagreed that the Union pays more than Target. One Target employee told Caron that he was making $17 an hour, considerably below the union scale. Adams also spoke to a Target employee, Gene Kline, who said he made less than scale.

Caron and Adams also testified about conversations they have had with Holtrop on the subject of Target's wages. Thus, before the picketing started, Caron spoke with Holtrop about the wages of Holtrop's sons, both journeymen who work for Target. According to Caron, Holtrop said, "You know, my sons aren't doing too bad, they're both making about 18 bucks an hour" (Tr. p. 256).[3]

Adams testified that Holtrop is his neighbor, and they speak often. In late 2000 or early 2001, Adams was handing out a flier with the Union's wage package on it. Holtrop said he was getting a wage review at Target soon and wanted to get as close to the union wage as possible. Adams also spoke with Holtrop's son Jamie in the summer of 2001. Jamie was working at a prevailing wage job at the time and pulled out his paycheck to show Adams that he was taking home more than a

[1] All dates are in 2003, unless otherwise indicated.

[2] During these proceedings, counsels at different times have called the picketing "informational" and/or "area standards." The picket signs used area standards language. In any event, the distinction is not material for purposes of this decision.

[3] The union wage for journeymen is $24.07 an hour plus benefits.

union worker. Adams explained that Jamie was getting more money in his paycheck because the benefits were different from the union's. When Adams asked if he would like to make the union rate all the time, Jamie said yes.

Holtrop testified that he did not know what his sons make at Target. Further, he has worked for Target for 10 years, and the only time he made less than union rate was during the first 6 months of his employment. Adams offered him a union job, and he replied that he would need to take a pay cut to come back to the Union. On cross-examination, when asked what his wage rate was in the fall of 2002, Holtrop evaded giving a direct answer by stating that the matter had to be looked at as a (wages and benefits) package and that he could not give an answer without doing the math. Significantly, he did not give any specific figures, only stating that his total package was "right up in the ball park" (Tr. p. 426).

I credit Caron's and Adams' testimony about their receipt of information about Target's compensation to its employees. Neither of them appeared to be exaggerating the extent of their inquiries into the matter, which were certainly not impressively extensive. Further, since neither Jamie Holtrop nor Kline was called as a witness, Adams' testimony concerning his conversations with them went uncontroverted. Finally, Holtrop's credibility was considerably undermined by his evasiveness in not answering what his wage rate was and by his failure to state any kind of figure on the record.

In late 2002, Egan was awarded the mechanical work on a new facility for the Grand Rapids Press (the Press). Egan initially intended to subcontract the sheet metal work to a union company located some distance from Grand Rapids. However, the Press wanted Egan to use a local company, and Egan then agreed to use Target.

On November 21, 2002, Adams called Schellenboom. According to the latter, Adams stated he was disappointed that Target had been awarded the mechanical work on the Press project, when a unionized company had been the lowest bidder. Schellenboom explained the above.

At around this time, Fuller and Schellenboom had two telephone conversations, both initiated by Fuller. Schellenboom put the dates as November 22 and December 2, 2002, whereas Fuller testified the first occurred "Sometime . . . in November," and the second, a week or two after that (Tr. pp. 397, 400). Contrary to the Union's contentions (Br. p. 16, et. seq.), I find no insufficiency in the evidence that these two specific conversations took place between Fuller and Schellenboom. I find it immaterial whether or not they occurred on the exact dates related by Schellenboom.

In the first conversation, both Fuller and Schellenboom recalled that the former stated he was upset that Target had been awarded the Press job and believed that Schellenboom was responsible for the decision. Schellenboom denied this, saying that the Press made it. Fuller stated he would make further inquiries on the matter.

Schellenboom further testified that in this conversation, Fuller also said that he was "fed up" with Egan using open shop subcontractors and that the Union would picket if necessary to get Egan to stop using them (Tr. pp. 122–123). Fuller denied that in this conversation, he threatened Schellenboom in any way.

On November 26, at a union meeting, the Union's leadership discussed taking action against Target. Fuller and Caron testified that members asked why Egan was not being targeted. Fuller responded that the Union could not take action against Egan because it would be secondary boycotting and also because Egan is a union contractor. The leadership did not mention a picket against Egan.

A week or so later, Fuller called Schellenboom again. Their versions of this conversation were radically different. According to Schellenboom, Fuller said that he was still upset that Egan had awarded the Press job to Target and that the Union was going to picket all of Egan's jobsites, that soon Egan would be "begging" to use union sheet metal workers, and that the Union was "going to bring Andy Egan Company to their knees" (Tr. pp. 124–125). Fuller also asked for the name of a contact at the Press, which Schellenboom gave him. Schellenboom stated that he was going to call Douglas Bennet, the business manager for the Plumbers and Pipe Fitters Union, and ask Bennet to call Fuller about this. Fuller then made disparaging remarks about Bennet. The only one Schellenboom could specifically recall was that Fuller called Bennet "an anti-union son of a bitch" (Tr. p. 126).

In contrast, Fuller's testimony was that he told Schellenboom he had verified through a contact at the Press that the Press made the decision to award the work to Target. He candidly testified that he "might" have told Schellenboom the specific locations where picketing against Target was planned, including the convention center project (Tr. p. 402). He denied making any threats against Egan, stating that he made it "real clear" that the picketing would be directed against Target (ibid).

Soon after this call, Schellenboom sent an e-mail to Bennet, in an effort to enlist his help in preventing any picketing against Egan.[4] The e-mail discussed the events of a union meeting, as related to Schellenboom by Michael Fish, an employee of a subcontractor, and two others whose names he did not know. Fish told him that at a union meeting on November 26, there was an action to fund pickets on Egan jobsites.[5] The e-mail states that at this meeting, the Union announced plans to set up pickets against Target at Egan jobsites and that Egan would be brought to its knees.

Schellenboom's e-mail made no mention whatsoever of Fuller's threats to picket. On cross-examination, Schellenboom agreed that to be effective in enlisting Bennet's help, he wanted his e-mail to include his strongest evidence that the Union was planning to picket Egan. Schellenboom's explanation of why he did not include these threats in the e-mail was that he did not want Bennet to know that Fuller had disparaged him.

I find wholly unconvincing Schellenboom's explanation for his failure to mention Fuller's alleged threats in his e-mail to Bennet. This would have been by far the strongest evidence of unlawful secondary intent, coming directly from an official of the Union. Second, Schellenboom could have related Fuller's threats without mentioning Fuller's remarks disparaging Ben-

[4] Co. Exh. 1.

[5] However, Adams testified that he checked the roster of names of people present at the November 26 meeting, and Fish was not listed.

net. Third, despite Schellenboom's testimony that Fuller made derogatory remarks, he could specifically recall only one. Finally, it strikes me as unlikely that Fuller, had he in fact made disparaging comments about Bennet, would have referred to the official of a sister union as "antiunion," as Schellenboom contends.

I also find an inherent contradiction in Schellenboom's testimony. Thus, although he testified that Fuller made express and unequivocal threats to picket Egan, he also testified that at the time he sent the e-mail, he did not know if the picketing was going to be against only Target, or against Egan as well. Crediting his version of what Fuller said in the two telephone conversations, no reasonable person would have doubted the Union's intention to picket Egan.

Therefore, based on the plausibility of their respective testimony, I credit Fuller's version of what he said to Schellenboom in those conversations and find that he did not threaten to picket Egan.

2. The reserve gate system

Caron testified that he and Adams discussed picketing Target because they were concerned that the Union was losing market shares in the Grand Rapids area; the Union never planned any kind of activity against Egan because Egan is a union contractor.[6]

Hunt Construction Manager Sewall testified as follows. In early January, he heard rumors that the Union was going to start picketing Egan and Target. On the morning of January 3, he called Adams, who told him that the Union's labor dispute was not with Egan but only with Target. Around 4 hours later, Sewall faxed to Adams and Fuller a memorandum detailing a gate system that was to be effective January 6.[7] Despite Sewell's conversation with Adams, this fax listed both Egan and Target as parties to the dispute and stated that gate 7 would be reserved for employees of both companies.

Adams testified that he did not receive the fax until after 4:30 on January 3, because he was out of the office during the day. He further testified that he was confused as to why Egan's name was listed on it.

Sewall, consistent with his memoranda, implemented a reserve gate system on the early morning of January 6. The seven gates were numbered "2" through "8."[8] Gates 2–5 were along Monroe Avenue on the east end of the site, and gates 6 and 7 were on Michigan Street on the north end of the site.

Gate 8 was at the northern end of a long driveway and sidewalk extending southward to Lyon Square, the southern end of the site. West of the driveway and sidewalk was a river, crossed by a pedestrian bridge used by the general public and workers at the site, who went from the parking lot to the worksite. At the end of this bridge and bordering the driveway and sidewalk was a building housing Target's offices, as well as those of Egan and other subcontractors on the project. The building had Target's name on the door, Target employees were in the offices on a daily basis, and Target trucks parked there.

Gate 7 was designated as the reserve gate. Although Adams had told Sewall that Egan was not a party to the dispute, the signs stated that gate 7 was for the exclusive use of both Egan and Target. The signs at the other gates listed the companies that could enter through those gates. Egan's name was not on them.

3. The picketing

On the morning of January 6, Caron instructed pickets to go to gate 7 or to the pedestrian bridge across from Target's offices, and picketing commenced. It was stipulated that all of the picket signs stated that Target paid substandard wages and benefits and made no mention of Egan.[9] At that time of year, employees at the site worked between 8 a.m. and 4:30 p.m.; the picketing took place between 10 a.m. and 2 p.m. Also on January 6, the Union began picketing Target's offices in Rockford. A month before the hearing in this matter, the Union began picketing another Target site in Grand Rapids.

The testimony of the various witnesses regarding the picketing that occurred on and after January 6 was generally consistent.

a. Picketing on the pedestrian bridge and in the vicinity of gate 8

Because the facts surrounding the picketing at these locations are intertwined, I will treat them together.

Gould was one of the pickets assigned that morning to go to the pedestrian bridge. He and about four others walked on the sidewalk in front of Target's offices, about 25–50 feet back and forth. He believed they were approximately 200 feet from the entrance to gate 8.

Sewall initially testified that on the morning of January 6, he observed two pickets heading north on the sidewalk and that they were halfway between the bridge and gate 8, and approximately 100 feet from the entrance to gate 8.[10] However, on cross-examination, after being shown Respondent's Exhibit 4, he changed his estimate to 200 feet from the entrance to gate 8, and thus was consistent with Gould.

At around noon, when Caron went over to the pedestrian bridge, security officer, Seifert, informed him that the pickets on the sidewalk were on private property. Caron immediately went to City Hall, where he checked public records and confirmed Seifert's assertion. He then returned and instructed the pickets to stay on the bridge.

Sewall stated that picketing continued that day on the other side of the sidewalk, between the pedestrian bridge and the amphitheatre, which is located at the end of Lyon Square. He took a picture of the pickets by the amphitheatre.[11] According to Sewall, the pickets on the bridge were twice as close to Target offices as they were to gate 8, and the pickets he saw in the amphitheatre area to the south of the bridge were about 30 feet from the Target offices and 300 feet from gate 8.

[6] Consistent with this, Cox testified that Caron called him on the morning of January 6 to participate in informational picketing against Target and made no mention of Egan.

[7] GC Exhs. 4 & 5, respectively. At about the same time, Sewall faxed a similar memorandum to all subcontractors. GC Exh. 3.

[8] See GC Exh. 2, a diagram (not to scale).

[9] See U. Exh. 3.

[10] See GC Exh. 6, a photograph he took.

[11] GC Exh. 11.

Gould testified that after January 6, the pickets always stayed on the bridge and never walked on the sidewalk. Both Seifert and Sewall testified consistently with Gould, and there is no contrary evidence of record.

Two Target job foremen testified about conversations with Caron. The first was Holtrop, who used the bridge to get to the Target offices and to gate 7. While crossing the bridge, Caron told him that the Union was trying to get better wages for Target employees.

The second was Hartwell. In early January, he was outside of gate 8 when Caron and Adams pulled up in a car. He asked what was going on, and they replied, "[W]e are not doing it against you" (Tr. p. 183). Caron's version was not inconsistent with Hartwell's. Thus, he recalled telling Hartwell that the dispute was not with the employees of Target but with its management for paying substandard wages. Contrary to the General Counsel (Br. pp. 20–21), I find the statement "[W]e are not doing it against you" too ambiguous to evidence any kind of secondary motive, even if Caron had not offered the elaboration to which he testified.

b. Picketing at gate 5

Adams and picket Cox testified that when the pickets arrived at gate 7, they were confused when they saw that the sign incorrectly said the gate was for both Egan and Target. Because the sign was incorrect, Adams decided they would picket at gate 5 as well, and he, along with Cox and others, then went there. They were at gate 5 for 40–55 minutes.

Cox testified that the pickets never moved off a public sidewalk, and that is where Sewall testified he saw them. After observing pickets at gate 5, Sewall returned to his office, where a representative of Egan contacted him and asked that Egan be removed from the reserve gate sign because Egan was not referenced on the picket signs. Sewall drafted a letter stating that as of noon of that day, gate 7 was reserved exclusively for Target.[12] He went back to gate 5 and handed the letter to Adams.

The pickets then left gate 5 and returned to gate 7, and Egan's name on the sign at gate 7 was covered up with duct tape.[13] There is no evidence that at any time thereafter, pickets ever returned to gate 5.

Applicable law

Section 13 of the Act, preserving the right of employees to strike "except as specifically provided for herein," also includes the right to picket. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 fn. 9 (1960). The distinction is made between picketing directed against an employer with which a union has a labor dispute—the "primary" employer—and picketing directed against entities with which the primary employer has a business relationship—neutral or "secondary" employers. Section 8(b)(4)(ii)(B) makes it unlawful for a union to engage in a secondary picket by pressuring a neutral employer to exert influence on the primary employer. *NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297 (1971). If an object of the union's conduct is unlawful, then there is a violation even if the union also has a legitimate motivation. *NLRB v. Enterprise Assn. of Steam Pipefitters Local 638*, 429 U.S. 507 (1977).

A union's unqualified threat to picket a secondary employer, in order to force it to cease doing business with the primary employer, also constitutes a violation of Section 8(b)(4)(ii)(B). *Teamsters Local 886 (Stephens Co.)*, 133 NLRB 1393, 1395 (1961).

At worksites where there is more than one employer, picketing must be structured to have as little an effect as possible on secondary employees and their employers. *Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253, 256 (1972). General contractors usually seek to accomplish this on a jobsite by the implementation of a reserve gate system, whereby one entrance to the site is set aside for the exclusive use of the traffic of the primary employer. *Electrical Workers Local 761 v. NLRB (General Electric)*, 366 U.S. 667 (1961). All other employers at the site use a different entrance, the purpose being to prevent the union from exerting pressure on neutral or secondary employers.

In analyzing reserve gate situations, the Board employs the framework set out in *Sailor's Union (Moore Dry Dock Co.)*, 92 NLRB 547, 549 (1950). A union's picketing is presumed to be lawful primary activity if: (1) it is "strictly limited to times when the situs of the dispute is located on the secondary employer's premises;" (2) "the primary employer is engaged in its normal business at the site;" (3) it is "limited to places reasonably close to the location of the situs;" and (4) it "discloses clearly that the dispute is with the primary employer." Ibid.

Failure to comply with any one of these elements creates a presumption that the picketing is for an unlawful purpose. *Electrical Workers (W.S.B. Electric)*, 269 NLRB 417, 421 (1984). Picketing at a neutral gate when a valid reserve gate system has been established violates the third *Moore* criterion, as to location. *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593, 600 (1999).

Even if there is full compliance with the *Moore* standards, picketing will not be found lawful if there is other evidence of secondary intent. *Electrical Workers Local 215 (Roundout Electric)*, 204 NLRB 468, 472 (1973). The "totality of a union's conduct in a given situation may well disclose a real purpose to enmesh neutrals in a dispute, despite literal compliance with the *Moore Dry Dock* standards." *Millwrights Local 1102 (Dobson Heavy Haul)*, 155 NLRB 1305, 1309 (1965). On the other hand, violation of the *Moore* criteria does not automatically create a violation of the Act. See *Electrical Workers Local 3 (Surf Hunter)*, 172 NLRB 1101, 1101–1102 (1968) (finding no violation where the union had the wrong name on pickets signs for a short period and otherwise complied with the *Moore* standards); *T. W. Helgesen v. Ironworkers Local 498*, 548 F.2d 175, 183 (7th Cir. 1977) (no violation for picketing that took place away from the reserved gate where the exact location of the public road was unclear, and the union otherwise complied with *Moore*); see also *Electrical Workers IBEW Local 25 (Eugene Lovine)*, 201 NLRB 531, 531–532 (1973); *New Power Wire & Electric Corp. v. NLRB*, 340 F.2d 71, 74 (2d Cir. 1965).

When area standards picketing is involved, the burden is on

[12] GC Exh. 8.
[13] See GC Exh. 9.

the union to first make reasonable inquiry to determine whether or not the picketed employer is meeting area standards, wages, and benefits. Otherwise, the purported purpose of area standards picketing may be deemed pretextual, and evidence of improper motive found. *Operating Engineers Local 150 (All American)*, 296 NLRB 933 (1989); *Carpenters Local 1622 (Iacono Structural Engineer)*, 250 NLRB 416 (1980); *Plumbers & Pipe Fitters Local 614 (Trumbo Welding & Fabricating Co.)*, 199 NLRB 1026 (1972).

Legal Analysis and Conclusions

1. The Union's determination regarding area standards

Both the General Counsel and Egan contend that the Union's investigation into Target wages and benefits was a sham and reflects that its purported area standards picketing was only a pretext to engage in unlawful secondary activity.

The law does not mandate that a union follow any particular process or procedure in ascertaining the wages and benefits being paid by an employer. There is no requirement that a formal written demand be made of the employer. Nor is there any requirement that a union show its investigation rose to the level of thorough or comprehensive. Rather, a union must demonstrate only that it made "reasonable inquiry," a term not susceptible of precise definition. Clearly, when a union has neither contacted the primary employer nor sought through any other means to determine the employer's wage rates, this standard is not met. *Operating Engineers Local 150 (All American)*, supra, cited by the General Counsel, stands for this proposition. See also *Plumbers Local 130 (Quality Co.)*, 272 NLRB 1045 (1984). Moreover, the Board has held the uncorroborated statement of one employee to a union agent concerning his wage rate, standing alone, is insufficient to satisfy this burden. *Carpenters Local 1953 (T & P Iron Works)*, 266 NLRB 617 (1983). Accord: *Operating Engineers Local 571 (J.E.D. Construction Co.)*, 237 NLRB 1386 (1979), also cited by the General Counsel.

Here, in contrast, union representatives not only spoke to a number of Target employees on various occasions, but they also had conversations with Holtrop, a job foreman and agent of Target. Thus, albeit informally, they made inquiry of the employer. Therefore, I conclude that the Union's investigation into the compensation Target paid its employees, while certainly not stellar, did amount to a "reasonable inquiry" and does not give rise to an inference of illegal secondary motive.

2. Fuller's alleged threats to picket Egan

As previously stated, I credit Fuller that he did not threaten to picket Egan in his telephone conversations with Schellenboom. The General Counsel argues, however, that even if Fuller did not threaten to picket Egan, the Union still violated the Act, because in Fuller's testimony about the November conversation, he did not specifically deny stating that he was fed up with Egan using nonunion subcontractors and wanted Egan to stop using nonunion companies. The General Counsel contends that these statements should be used to infer secondary intent.

As a matter of evidence, I disagree and conclude that Fuller's failure to make a specific denial does not warrant an inference of secondary intent. Fuller expressly testified that he did not threaten Egan "in any way" during their conversation (Tr. p. 399), a general denial that encompassed a denial of the specific statements Schellenboom attributed to him.

The General Counsel also argues that Fuller's testimony about the second phone conversation establishes a violation of the Act because Fuller testified that he might have told Schellenboom the locations where the Union would be picketing Target. Again, I disagree. As stated in *Food & Commercial Workers Local 506 (Coors Distributing)*, 268 NLRB 475, 478 (1983), "In cases dealing with threats to picket at a secondary employer's business, the burden is on the union to restrict its statements to the giving of notice of prospective lawful activity against the primary. Unqualified or ambiguous threats will be construed against the union as threats to the secondary's business relationship with the primary."

Here, however, Fuller's credited testimony was that he "made it real clear" that the Union's picketing would be directed against Target (Tr. 402). Any statement he made about the locations where picketing would be conducted were not unqualified or ambiguous with regard to Egan. Since Fuller expressly specified Target as the object of the picketing, such statement was neither unqualified nor ambiguous. Therefore, Fuller's failure to explicitly assure Schellenboom that the pickets would not enmesh neutral employers did not alone constitute a violation of the Act. *NLRB v. Ironworkers Local 433 (United Steel)*, 850 F.2d 551, 555–557 (9th Cir. 1988), denying enf. 280 NLRB 1325 (1986).

For these reasons, I recommend dismissal of paragraph 11 of the complaint.

3. The Union's picketing

The General Counsel argues that the Union demonstrated unlawful secondary intent by picketing at the pedestrian bridge and at neutral gates, in noncompliance with the third *Moore* element that picketing be "limited to places reasonably close to the location of the situs."

More specifically as to the pedestrian bridge, the General Counsel argues that the Union's secondary intent is apparent because pickets stood on the pedestrian bridge utilized by the employees of secondary employers and other persons, rather than directly in front of the building in which Target's offices were located. However, there is no requirement that a union place pickets directly in front of a primary employer's offices for the picketing to be lawful. Indeed, here the building housing Target's offices was shared by Egan and other contractors, and placing pickets directly in front of the building would have increased rather than decreased the possibility of enmeshing neutrals. Additionally, it would have resulted in potential obstruction of the sidewalk and driveway leading to gate 8. Thus, picketing in front of Target's offices would more likely have impacted neutrals than the picketing that took place on the bridge.

I conclude, therefore, that the picketing at the pedestrian bridge did not run afoul of the *Moore* standards, including criterion number 3 as to proximity to the situs of the dispute, and that the totality of circumstances does not demonstrate unlawful secondary activity at that site.

Accordingly, I recommend dismissal of paragraph 14 of the complaint.

Turning to gate 8, the General Counsel argues that the picketing along the sidewalk in its direction shows that the Union was picketing at the gate. However, there is no evidence that the pickets ever reached gate 8 or even got close to it. Although General Counsel's Exhibit 6 seemingly shows two pickets walking in the direction of gate 8, at the time the photograph was taken, the pickets were in front of the building in which Target had its offices. At no time were the pickets closer to gate 8 than they were to Target's offices.

I conclude as to gate 8 that the Union complied with the *Moore* criteria, including element 3. In light of this conclusion and the totality of circumstances, I further conclude that the Union did not engage in unlawful secondary activity there. I deem it particularly significant that, after learning on January 6 that the sidewalk leading to gate 8 was private property, the pickets left the sidewalk and at all times thereafter confined their picketing to the pedestrian bridge directly across from Target's offices.

Accordingly, I recommend dismissal of paragraphs 13 as it relates to gate 8.

Finally, I turn to the alleged unlawful picketing at gate 5. The Union admits that its pickets were at gate 5 for approximately 40–55 minutes on the morning of January 6. Adams claims he sent pickets to gate 5 because of confusion when the reserve gate sign at gate 7 listed Egan as well as Target.

The General Counsel argues that Adams's claim of confusion over the sign was not genuine because the Union received a fax stating that Egan would be listed on the reserve gate sign, along with Target. However, only hours before the gate system was set up, Adams had told Sewall that Egan was not a party to the dispute. For an inexplicable reason, Sewall nevertheless included Egan's name with Target's on the sign at gate 7, the reserve gate. This may well have been an inadvertent error but, regardless of the reason, Adams had good cause to be confused when he saw Egan's name on the reserve gate sign.

There also is a fundamental flaw in the General Counsel's argument that the Union's picketing at gate 5 demonstrated secondary intent aimed at Egan: at the time the picketing occurred there, Egan was not listed as a neutral contractor that could enter through that gate; rather, Egan was included with Target at gate 7.

Significantly, as soon as the Union received notice that the gate signs would be changed to delete Egan's name from gate 7, leaving Target as the only company to use the reserve gate, the Union immediately relocated its pickets from gate 5 to gate 7, and they never returned to gate 5.

In all of these circumstances, I conclude that even if there was any technical violation of the Moore criterion with respect to location of the situs, it was inadvertent and of short duration and did not rise to the level of noncompliance. See *Electrical Workers Local 3 (Surf Hunter)*, supra (wrong name was on picket sign for several hours). Accordingly, I further conclude that the picketing at gates 5 and 7 satisfied the elements of *Moore*, including element 3 with respect to location of the situs. The totality of circumstances does not reveal evidence of secondary motive that would rebut the resulting presumption arising under *Moore* that the picketing had a legitimate primary objective.

For these reasons, I recommend dismissal of paragraph 13 of the complaint as it relates to gate 5.

In conclusion, the Union's picketing at the project complied with the *Moore* standards, and the totality of evidence fails to support a conclusion that the Union had an unlawful secondary intent of forcing or requiring Egan to cease doing business with Target.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.[15]

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[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] The Union has requested costs and attorney's fees (Br. p. 32). Inasmuch as no final order has issued, this matter is not now ripe for adjudication. See Section 102.148 of the Board's Rules and Regulations.